

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 08-0730 WHA

Plaintiff,

v.

**OMNIBUS ORDER RE PRETRIAL  
MOTIONS FOR APRIL 4 TRIAL**

IVAN CERNA, *et al.*,

Defendants.

**INTRODUCTION**

In this massive RICO/VICAR prosecution, eight defendants are proceeding to trial on April 4. Numerous pretrial motions were filed by the government and defendants Jonathan Cruz-Ramirez, Moris Flores, Manuel Franco, Angel Noel Guevara, Guillermo Herrera, and Erick Lopez. An even larger number of joinder motions were filed. The motions were heard at a lengthy final pretrial conference spanning February 14, 15, and 16. This omnibus order addresses most final pretrial motions — even if the motion is deferred for ruling at trial. Defendant Guillermo Herrera’s motion to dismiss (Dkt. No. 3136), defendant Lopez’s motion to preclude victim identification (Dkt. No. 3141), the government’s challenge to defense experts (Dkt. No. 3371), motions relating to the use of an anonymous jury (Dkt. Nos. 2654, 2680, 2879, 3192), *Massiah* motions, and various requests regarding jury selection procedure are or will be addressed in separate orders.

1 As with all evidentiary rulings, a denial of a motion to exclude evidence does not  
2 necessarily mean that the evidence will be admitted — it only means that the motion did not  
3 articulate sufficient grounds to exclude the evidence. A proper foundation must be laid prior  
4 to the admission of any evidence.

## 5 DEFENDANTS' PRETRIAL MOTIONS

### 6 1. MODIFICATION OF PROPOSED TRIAL SCHEDULE (DKT. NO. 3134)

7 Defendant Guillermo Herrera moves to modify the trial schedule and to allow client  
8 visits in the federal building until 5 p.m. on trial days (Dkt. No. 3134). This request is  
9 **GRANTED IN PART AND DENIED IN PART**. As stated at the pretrial conference, the schedule  
10 will be 7:30 a.m. to 1:00 p.m., Monday through Friday. This will provide dark periods from  
11 1:00 p.m. through the end of each day. Based on the maximum trial length estimate provided  
12 by the defense and government, the undersigned solicited a prospective venire with  
13 availability for six months beginning on March 7 (the prior trial date). If, as the trial  
14 develops, it appears that we will have the luxury of entire dark days as well, some will be set.

15 Defendants Cruz-Zavala, Flores, Guevara, Lopez, Portillo, and Velasquez move to  
16 join in the motion (Dkt. Nos. 3208, 3228, 3233, 3235, 3241, 3258, 3357). All joinder motions  
17 are **GRANTED** except those filed by defendants Velasquez and Portillo. The joinder motions  
18 of defendants Velasquez and Portillo are **DENIED** without prejudice to bringing new motions  
19 specific to their trial. Defendants Velasquez and Portillo have been severed and the facts  
20 surrounding their trial may differ.

### 21 2. JURY PRESENCE DURING EXPERT *VOIR DIRE* (DKT. NO. 3138)

22 Defendant Erick Lopez originally filed a motion requesting that any argument on the  
23 qualifications of expert witnesses and any subsequent findings on the relevant expert's  
24 qualifications be made outside the presence of the jury (Dkt. No. 3138). The motion did not  
25 specify which experts it was directed to and did not articulate any basis for why qualification  
26 of any of the experts for trial in the presence of the jury would be unduly prejudicial. At the  
27 pretrial conference, defendant Lopez specified that the motion was directed to the gang  
28 experts, and the Court clarified that even though it had not been shown that it would be

1 prejudicial if experts were “qualified” in front of the jury, the parties should refrain from  
2 asking the Court to declare to the jury that an expert is qualified (Feb. 15 Tr. 192–93).  
3 Accordingly, defendant Lopez withdrew the motion and the motion was **DENIED** as moot.

4       Regardless, the jury will be instructed that while some witnesses are permitted to give  
5 opinion testimony, this opinion testimony should be viewed no differently than other types of  
6 testimony. The government has agreed that this is an appropriate method for addressing the  
7 concern (Dkt. No. 3277 at 2).

8       Defendants Cruz-Zavala, Flores, Guevara, Hernandez, and Portillo move to join in the  
9 motion (Dkt. Nos. 3175, 3181, 3182, 3186, 3195, 3236). All joinder motions are **GRANTED**  
10 except the joinder motion of defendant Portillo. Defendant Portillo’s joinder motion is  
11 **DENIED** without prejudice to bringing a new motion specific to his trial. Defendant Portillo  
12 has been severed for a separate trial and the circumstances — including which experts will  
13 testify — may differ.

### 14       3.       CIVILIAN CLOTHING AND SHACKLING (DKT. NO. 2915)

15       Defendant Cruz-Ramirez moves to appear at trial in civilian clothing and without  
16 shackles (Dkt. No. 2915). This motion is **GRANTED IN PART AND DENIED IN PART**. All  
17 defendants may appear at trial in civilian clothing. The defendants in the April 4 trial,  
18 however, will be restrained on one ankle. This will not be visible to the jury because the trial  
19 will be in the secure courtroom.

20       In order to restrain a defendant at trial, a trial court must: (1) “be persuaded by  
21 compelling circumstances that some measure is needed to maintain the security of the  
22 courtroom”; and (2) “pursue less restrictive alternatives before imposing physical restraints.”  
23 *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 2000) (citation omitted). The trial court should  
24 weigh the benefits of the restraints against the risk of: (1) jury prejudice; (2) impairment of  
25 the defendant’s mental faculties; (3) impediment of communication between the defendant  
26 and counsel; (4) detraction from the decorum of the judicial proceeding; and (5) pain to the  
27 defendant.

1           The decision to use restraints may be based on the conduct of the defendant outside of  
2 court proceedings — the defendant’s conduct in settings such as county jail may be  
3 considered in making the decision. *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985).  
4 Here, there are compelling circumstances that require some form of restraint of the defendants  
5 to ensure security in the courtroom during trial. All defendants are alleged to be members of a  
6 violent street gang. Since the instant action has commenced, six of the eight defendants  
7 proceeding to trial on April 4 have been alleged to have exhibited violent and/or threatening  
8 behavior towards codefendants, perceived cooperators, and law enforcement. Specifically,  
9 evidence supporting the following has been provided: (1) defendant Guevara threatened to kill  
10 a deputy at Glenn Dyer Jail and was caught attempting to send from prison a photograph of  
11 two individuals identified as “rats”; (2) defendants Flores and Guillermo Herrera assaulted a  
12 codefendant prior to a court appearance; (3) defendant Lopez attacked a codefendant as they  
13 were being moved within the courthouse; (4) defendants Cruz-Ramirez and Cruz-Zavala  
14 assaulted two deputies at Glenn Dyer Jail, fracturing one deputy’s nose; (5) defendant Cruz-  
15 Ramirez purportedly gave information to a fellow gang member on certain individuals who  
16 needed to be “taken care of”; and (6) defendant Flores attempted to organize an attack and  
17 escape from prison transportation.

18           Although defendants Hernandez and Marvin Carcamo have not been alleged to have  
19 participated directly in any of these aforementioned acts, like all of the remaining defendants,  
20 they are charged with conspiracy to commit murder and assault with a dangerous weapon in  
21 aid of RICO, and there is significant risk that they could harm codefendants, counsel, jurors,  
22 court staff, or members of the public. Exacerbating these concerns is that all of the remaining  
23 defendants face charges with a maximum term of life imprisonment and have a corresponding  
24 incentive to disrupt the proceedings or attempt to escape.

25           After consultation with the United States Marshals Service, the undersigned has  
26 concluded the minimal restriction to ensure court proceedings are secure is the use of a single  
27 restraint on one ankle of each defendant. Special arrangements have been made to ensure that  
28 these restraints are inaudible and not visible to the jury. Trial will be held in a courtroom that

1 features a seating area which shields defendants' legs and feet from the jury's view. The  
2 defendants will not be required to stand up during trial (although the ankle restraints do permit  
3 enough free-range of motion that standing is easily possible) and defendants will not be  
4 moved in the presence of the jurors. Additionally, the ankle restraints have been modified and  
5 covered in a plastic material so that they are inaudible. The appearance, comfort-level, and  
6 sound-level of the shackles have been observed and tested by the undersigned.

7 Notably, all defendants' hands will be free — which the jurors will be able to see.  
8 Although this poses a security risk, this is an adequate compromise between ensuring the jury  
9 is not prejudiced and ensuring safety. Each defendant will be seated next to his counsel,  
10 which will allow for easy communication with counsel.

11 Finally, there is no indication that the ankle restraints will cause pain or impair  
12 defendants' mental faculties. The undersigned has not received any complaints regarding the  
13 restraints that have been used to-date for pretrial hearings, which are far more restrictive than  
14 a single ankle restraint for trial.

15 Defendants Cruz-Zavala, Flores, Franco, Guevara, Guillermo Herrera, Lopez,  
16 Hernandez, Portillo, and Velasquez move to join in the motion (Dkt. Nos. 2939, 2970, 3090,  
17 3092, 3095, 3117, 3145, 3149, 3187). All joinder motions are **GRANTED** except those filed  
18 by defendants Franco, Velasquez, and Portillo. The joinder motions of defendants Franco,  
19 Velasquez, and Portillo are **DENIED** without prejudice to bringing new motions specific to  
20 their trial. Defendants Franco, Velasquez, and Portillo have been severed and the security  
21 concerns may differ given the smaller number of defendants proceeding to that trial and other  
22 logistical differences.

23 **4. COPIES OF DISCOVERY NEAR COURTROOM (DKT. NO. 2944)**

24 Defendant Cruz-Ramirez moves for an order permitting the combined defense to  
25 house one full copy of discovery necessary for the conduct of trial either in or near the trial  
26 courtroom (Dkt. No. 2944). For good cause shown, the motion is **GRANTED**. A prior order  
27 already notified defense counsel that courtroom 17 on the 16th floor of the courthouse would  
28

1 be made available for the exclusive use of defense counsel as workspace during trial (Dkt. No.  
2 2867).

3 Defendants Hernandez, Cruz-Zavala, Portillo, Velasquez, Lopez, and Guevara move  
4 to join in the motion (Dkt. Nos. 2970, 3092, 3095, 3117, 3171, 3187). All joinder motions are  
5 **GRANTED** except those filed by defendants Velasquez and Portillo. The joinder motions of  
6 defendants Velasquez and Portillo are **DENIED** without prejudice to bringing new motions  
7 specific to their trial. Defendants Velasquez and Portillo have been severed and the need for a  
8 separate, dedicated space for defense storage may not be necessary, depending on which  
9 courtroom will be used and other logistical issues not yet determined.

10 **5. ADVANCE NOTICE OF ALL WITNESSES TO BE CALLED AND INCIDENTS TO BE**  
11 **COVERED DURING TRIAL WEEK (DKT. NO. 3327)**

12 Defendant Cruz-Ramirez moves for advance notice of all witnesses to be called and  
13 incidents to be covered during the trial week (Dkt. No. 3327). This motion is **GRANTED IN**  
14 **PART**. As stated at the pretrial conference, the government has agreed to provide the defense  
15 with at least two days advance notice of the witnesses that will be called (Feb. 14 Tr. 227;  
16 Feb. 15 Tr. 199). Of course, modifications may be made to the government's trial plans, but  
17 the notice shall be the government's best good faith estimate as to which witnesses it will call.  
18 This will allow for the orderly progression of trial and will greatly facilitate matters,  
19 especially given that the government's witness list contains 252 witnesses.

20 Defendants Cruz-Zavala, Flores, Guevara, Lopez, Hernandez, and Portillo move to  
21 join in the motion (Dkt. Nos. 3339, 3340, 3344, 3345, 3348, 3382). All joinder motions are  
22 **GRANTED** except the joinder motion of defendant Portillo. Defendant Portillo's joinder  
23 motion is **DENIED** without prejudice to bringing a new motion specific to his trial. Defendant  
24 Portillo has been severed and the circumstances relevant to his trial may differ.

25 **6. MOTIONS TO EXCLUDE PRIOR CONVICTIONS FOR IMPEACHMENT PURPOSES**  
**(DKT. NOS. 2942, 3073, 3139)**

26 **A. Defendant Lopez's Motion to Exclude Misdemeanor Grand Theft**  
27 **Conviction (Dkt. No. 3139)**

28 Defendant Lopez moves to exclude his misdemeanor grand theft conviction for  
impeachment purposes (Dkt. No. 3139). The motion is **DENIED** as moot. The government

1 has agreed that it will not use the misdemeanor conviction at trial for any purpose, including  
2 impeachment (Feb. 14 Tr. 212–13).

3 **B. Defendant Guillermo Herrera’s Motion to Exclude Past**  
4 **Misdemeanor Battery Conviction (Dkt. No. 3073)**

5 Defendant Guillermo Herrera moves to preclude impeachment by his prior  
6 misdemeanor battery conviction (Dkt. No. 3073). This motion is **GRANTED IN PART AND**  
7 **DENIED IN PART**. The government has agreed that it will not use the conviction for pure  
8 impeachment should defendant Guillermo Herrera testify. The government is limited to using  
9 the conviction as direct evidence of the charged conspiracies.

10 As discussed at the pretrial conference, the parties agree that Rule 609 prohibits the  
11 battery conviction itself from being used for impeachment during closing arguments (Feb. 14  
12 Tr. 217–18). The parties dispute, however, whether the conduct underlying the conviction  
13 may be used for impeachment during closing arguments. This order tentatively finds that  
14 although the government may present argument regarding defendant Guillermo Herrera’s  
15 truthfulness during its closing statement, the government may not directly argue that facts  
16 surrounding the battery are specifically indicative of untruthfulness unless the government  
17 first demonstrates that those facts are actually probative of truthfulness. Accordingly, a ruling  
18 on this issue will be reserved until evidence regarding the misdemeanor conviction is  
19 presented at trial. At that time, defendant Guillermo Herrera may renew his motion.

20 **C. Defendant Cruz-Ramirez’s Motion to Preclude Impeachment by**  
21 **Prior Firearms Conviction and Juvenile Criminal Convictions**  
22 **(Dkt. No. 2942)**

23 Defendant Cruz-Ramirez moves to preclude impeachment by his prior federal firearms  
24 conviction and/or juvenile criminal convictions (Dkt. No. 2942). This motion is **GRANTED IN**  
25 **PART AND DENIED IN PART**. The government has taken the same position with respect to  
26 defendant Cruz-Ramirez’s convictions as it did for defendant Guillermo Herrera’s conviction  
27 — it has agreed that it will not use the convictions for pure impeachment and will limit its use  
28 of the convictions as only direct evidence of the charged conspiracies. The protocol for  
impeaching defendant Cruz-Ramirez during closing argument with the facts underlying or  
surrounding the conviction will be identical to the protocol for defendant Guillermo Herrera’s

1 misdemeanor battery conviction. The convictions themselves may not be used for  
2 impeachment during closing argument. Whether the government may argue during closing  
3 argument that the facts underlying the convictions are indicative of truthfulness, however, will  
4 be a matter reserved for trial. At that time, defendant Cruz-Ramirez may renew his motion.

5 Defendants Hernandez, Cruz-Zavala, Guevara, Velasquez, Portillo, and Flores move  
6 to join in the motion (Dkt. Nos. 2970, 3092, 3095, 3117, 3145, 3187). All joinder motions are  
7 **DENIED** except for the motion filed by defendant Flores, which is **GRANTED**. Except for  
8 defendant Flores, no defendant has alleged that they have any juvenile convictions, nor have  
9 they asserted which convictions they seek to prevent the government from using for  
10 impeachment. Without this critical information, the propriety of the joinder motions cannot  
11 be assessed.

12 **7. DEFENDANT FLORES' UNCHARGED CONDUCT (DKT. NO. 3144)**

13 Defendant Flores moves to exclude any testimony concerning his alleged sexual  
14 assault of a cooperating witness' sister. The government has specified that the only reason it  
15 would elicit any such testimony would be to disclose any potential bias harbored by the  
16 cooperating witness, but agrees that if the defense will not cross-examine the cooperating  
17 witness on the issue, the government will not elicit any testimony on the issue (Dkt. No.  
18 3278). Accordingly, defendant Flores' motion is **GRANTED**. No reference to the alleged  
19 sexual assault of the cooperating witness' sister may be made by either the prosecution or  
20 defense at trial without prior permission from the Court.

21 **8. STATEMENTS MADE TO INFORMANTS AND COOPERATORS UNAVAILABLE**  
22 **FOR CROSS-EXAMINATION (DKT. NO. 2945)**

23 Defendant Cruz-Ramirez seeks a ruling excluding from trial any statement made by  
24 defendant Cruz-Ramirez to an informant or cooperator who is not available for cross-  
25 examination and/or who will not testify at trial, including statements by law enforcement  
26 witnesses summarizing any such statements (Dkt. No. 2945). The motion also seeks to  
27 exclude any statement attributed to defendant Cruz-Ramirez by any informant or cooperator  
28 who cannot be cross-examined where it is clear that the informant or cooperator provided the  
statements to law enforcement knowing they would be used and where the informant or



1   cooperator was clearly acting as a surrogate for the officers. The motion, however, does not  
2   provide a list of all the statements that are sought to be excluded. In other words, the motion  
3   seeks a general statement that the government will not be permitted to violate the  
4   Confrontation Clause and the Federal Rules of Evidence. This is too abstract.

5           As stated at the pretrial conference, the motion is **DENIED** without prejudice to  
6   challenges at trial to specific statements (Feb. 14 Tr. 188). Without further information  
7   regarding the challenged statements and the context in which they were given, the  
8   undersigned cannot determine whether the statements are “testimonial” statements pursuant to  
9   *Crawford v. Washington*, 541 U.S. 36 (2004). Furthermore, the motion is largely moot as the  
10   government has made clear that it does not intend to introduce evidence that is inadmissible  
11   under *Crawford*, the Constitution, or the Federal Rules of Evidence (Dkt. No. 3269; Feb. 14  
12   Tr. 185–86).

13           Defendants Hernandez, Cruz-Zavala, Portillo, Velasquez, Flores, Lopez, and Guevara  
14   move to join in the motion (Dkt. Nos. 2970, 3092, 3095, 3117, 3145, 3176, 3187). These  
15   joinder motions are **GRANTED**.

16           **9.     DRUG IDENTIFICATION EXPERT TESTIMONY (DKT. NO. 2943)**

17           Although the government has indicated it does not intend to present expert evidence  
18   on drug identification, defendant Cruz-Ramirez moved to preclude the government from  
19   introducing opinion testimony of drug identification where: (1) there is no drug identification  
20   lab report; or (2) the alleged drugs have been lost or destroyed (Dkt. No. 2943). The  
21   government does not oppose the motion because, as it has previously stated, it does not intend  
22   to introduce any such testimony (Dkt. No. 3276). Accordingly, as stated at the pretrial  
23   conference, this portion of the motion is **DENIED** as moot (Feb. 14 Tr. 181).

24           Defendant Cruz-Ramirez also seeks to preclude lay witnesses from identifying at trial  
25   drug evidence that has been destroyed. As stated at the pretrial conference, this request is  
26   **DENIED** without prejudice to specific challenges (Feb 14 Tr. 182–183). The government has  
27   agreed to make an inquiry regarding whether it will even utilize any lay witness testimony  
28   regarding drugs that were seized by the police or other authorities but have been subsequently

1 destroyed (Feb. 14 Tr. 184). If it turns out that the government intends to use such testimony,  
2 the testimony may be challenged with respect to such specific instances.

3 Defendants Cruz-Zavala, Flores, Guevara, Guillermo Herrera, Hernandez, Lopez,  
4 Portillo, and Velasquez move to join in the motion (Dkt. Nos. 2970, 3049, 3092, 3095, 3117,  
5 3145, 3170, 3187). All joinder motions are **GRANTED** except those filed by defendants  
6 Velasquez and Portillo. The joinder motions of defendants Velasquez and Portillo are  
7 **DENIED** without prejudice to bringing new motions specific to their trial. Defendants  
8 Velasquez and Portillo have been severed and the relevant circumstances may differ.

9 **10. MOTION TO EXCLUDE GRUESOME/REPETITIVE HOMICIDE PHOTOGRAPHS**  
10 **AND PHOTOGRAPHS OF HOMICIDES NOT CHARGED AGAINST DEFENDANT**  
11 **CRUZ-RAMIREZ (DKT. NO. 2916)**

12 As stated at the pretrial conference, the government must prove the homicides and the  
13 circumstances of the homicides, so a reasonable number of photographs will be permitted as  
14 to each. At some point, the photographs will be too repetitive and will be excluded. The  
15 motion is **DENIED** without prejudice to re-raising when that point has been reached.

16 As Attorney Philipsborn and Assistant United States Attorney Frentzen agreed at the  
17 pretrial conference, they are to meet and confer to try to vet the photographs in advance and  
18 resolve any disputes in an orderly fashion (Feb. 14 Tr. 144). Defense counsel have agreed  
19 that Attorney Philipsborn may represent the defense collectively at this meet and confer.

20 Defendants Hernandez, Franco, Guillermo Herrera, Cruz-Zavala, Portillo, Velasquez,  
21 Flores, Lopez, and Guevara move to join in the motion (Dkt. Nos. 2970, 2939, 3090, 3092,  
22 3095, 3117, 3145, 3167, 3187). All joinder motions are **GRANTED** except those filed by  
23 defendants Velasquez and Portillo. The joinder motions of defendants Velasquez and Portillo  
24 are **DENIED** without prejudice to bringing new motions specific to their trial. Defendants  
25 Velasquez and Portillo have been severed and they may need to engage in a separate meet-  
and-confer process with the government.

26 **11. MOTION TO EXCLUDE EVIDENCE OF GLENN DYER JAIL INCIDENTS (DKT.**  
27 **NO. 3156)**

28 Defendant Guevara moves to exclude evidence of two incidents that took place at the  
Glenn Dyer Detention Facility: (1) an incident where defendant Guevara allegedly possessed

1 contraband razor blades in his cell, threatened a deputy, and brandished his MS-13 tattoos;  
2 and (2) an incident where defendant Guevara allegedly attempted to smuggle photographs  
3 identifying three suspected government informants as “rats” out of prison (Dkt. No. 3156).

4 The motion is **DENIED**.

5 The incidents are relevant to the charges against defendant Guevara as the incidents  
6 speak to the existence of MS-13, defendant Guevara’s participation in MS-13, consciousness  
7 of guilt, continued participation in MS-13 after arrest, and the nature of MS-13. Defendant  
8 Guevara prominently displayed his gang-affiliation in one incident and sought to identify  
9 “enemies” of MS-13 in the other.

10 Evidence of the incidents is similarly not barred by Rule 404(b) as the incidents are  
11 directly probative of elements of the racketeering conspiracy charges — the existence of the  
12 racketeering conspiracy and defendant Guevara’s membership in it. Moreover, even if the  
13 incidents were “other acts” under Rule 404(b) — which they are not — the incidents are  
14 admissible as proof of defendant Guevara’s intent, knowledge, or absence of mistake.  
15 Defendant Guevara’s alleged behavior demonstrates a knowing membership and/or  
16 association with MS-13 and a desire to further MS-13’s interests.

17 Finally, the danger of *unfair* prejudice does not outweigh the probative value of the  
18 evidence. Prejudice alone is not enough — the prejudice must be unfair in that it risks luring  
19 the “factfinder into declaring guilt on a ground different from proof specific to the offense  
20 charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The incidents are directly  
21 relevant to the instant case and evidence of the incidents is thus not unfairly prejudicial.  
22 Regardless, the direct relevance and probative nature of the evidence outweighs any  
23 prejudice.

24 Defendants Cruz-Zavala, Guillermo Herrera, and Hernandez move to join in the  
25 motion (Dkt. Nos. 3185, 3236, 3158). These joinder motions are **GRANTED**. Defendant  
26 Guillermo Herrera’s request for severance from defendant Guevara should the incidents not  
27 be excluded is **DENIED**. Defendant Guillermo Herrera is a codefendant to defendant Guevara  
28

1 and is charged with conspiracy — and the incidents were allegedly in furtherance of the  
2 conspiracy and provide insight into the nature of the conspiracy. Severance is not warranted.

3 **12. MOTION TO EXCLUDE ALL REFERENCES TO VERONICA HERNANDEZ AS**  
4 **RELATED TO DECEMBER 2007 STABBINGS (DKT. NO. 3133)**

5 Defendant Guevara moves to exclude all references to Veronica Hernandez as related  
6 to the December 2007 stabbings. The motion is **DENIED** as moot as it was withdrawn at the  
7 pretrial conference (Feb. 14 Tr. 169). The government is reminded, however, that it cannot  
8 call Ms. Hernandez in the presence of the jury if she will exercise her Fifth Amendment right  
9 against self-incrimination. Accordingly, she should not be called until the government  
10 determines whether she will or will not testify.

11 **13. MOTION TO EXCLUDE TESTIMONY OF COOPERATING WITNESSES WHO**  
12 **HAVE RECEIVED PAYMENT OR OTHER CONSIDERATION (DKT. NO. 2941)**

13 Defendant Cruz-Ramirez moves to exclude all testimony of cooperating witnesses  
14 who have received payment or other consideration, or in the alternative, requests that the  
15 defense be permitted to offer grants of judicial immunity to certain witnesses (Dkt. No. 2921;  
16 Feb. 14 Tr. 178–179). For the reasons stated at the pretrial conference, the motion is **DENIED**  
17 without prejudice to specific requests for judicial immunity for certain witnesses where  
18 appropriate (Feb. 14 Tr. 181).

19 Defendants Cruz-Zavala, Flores, Franco, Guevara, Hernandez, Guillermo Herrera,  
20 Lopez, Portillo, and Velasquez move to join in the motion (Dkt. Nos. 2970, 3049, 3090, 3092,  
21 3095, 3117, 3145, 3169, 3187). These joinder motions are **GRANTED**.

22 **14. MOTION FOR EXCLUSION OF POST-ARREST INCIDENTS, STATEMENTS, JAIL-**  
23 **RELATED CONDUCT ISSUES NOT CHARGED IN CURRENT INDICTMENT OR**  
24 **COVERED IN GANG EXPERT DISCLOSURES (DKT. NO. 3328)**

25 Defendant Cruz-Ramirez moves to exclude all post-arrest incidents, statements, and  
26 jail-related conduct not charged in the current indictment or covered in the gang expert  
27 disclosures pursuant to Rule 403. The motion is **GRANTED IN PART AND DENIED IN PART**.  
28 The motion only presents one specific example of an incident it seeks to exclude — the May  
2010 fight between defendant Cruz-Ramirez, Cruz-Zavala, and a jail deputy. With respect to  
this specific challenge, the motion is **PROVISIONALLY GRANTED**. The parties are

1 provisionally ordered not to make any mention of the May 2010 fight until the Court can see  
2 how probative it will be for the issues in play, particularly the extent to which the suggestion  
3 is made to the jury that either defendant Cruz-Zavala or defendant Cruz-Ramirez ceased  
4 participation in gang activities by May 2010. No reference shall be made to the incident until  
5 the Court has an opportunity to revisit the question.

6 The remainder of the motion is **DENIED** without prejudice to challenges to specific  
7 incidents. In this instance, the necessary information is in possession of defendants because  
8 each defendant knows what he has done while in custody and can be specific. If post-arrest  
9 conduct is sought to be excluded, more specificity must be provided as to the specific  
10 incidents that should be excluded under Rule 403 and why.

11 Defendants Cruz-Zavala, Flores, Guevara, Guillermo Herrera, Hernandez, Lopez, and  
12 Portillo move to join in the motion (Dkt. Nos. 3338, 3339, 3340, 3344, 3345, 3348, 3383).  
13 These joinder motions are **GRANTED**.

14 **15. COCONSPIRATOR STATEMENTS AND ACTS PRIOR TO DEFENDANTS**  
15 **REACHING AGE OF MAJORITY AND/OR PRIOR TO ENTRY INTO THE**  
16 **CONSPIRACY (DKT. NOS. 2918, 2921, 3137, 3142)**

17 Defendants Lopez and Cruz-Ramirez move to exclude acts and/or statements made by  
18 coconspirators prior to their entry into the conspiracy (Dkt. Nos. 2918, 3137). These motions  
19 are **DENIED**.<sup>1</sup> Although a defendant cannot be held substantively liable for the acts of  
20 coconspirators prior to entry into the conspiracy, the acts and statements of coconspirators  
21 predating a defendant's entry may be admitted as evidence of the existence and scope of the  
22 conspiracy.

23 Defendants Cruz-Ramirez and Flores also move to exclude evidence of all acts or  
24 statements of coconspirators that occurred prior to when they reached the age of majority  
25  
26

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27 <sup>1</sup> Defendants Cruz-Zavala, Flores, Franco, Guevara Hernandez, Guillermo Herrera, Portillo, and  
28 Velasquez move to join in defendant Cruz-Ramirez's motion (Dkt. Nos. 2939, 2970, 3090, 3092, 3095, 3117,  
3145, 3187). Defendants Cruz-Zavala, Guevara, Hernandez, and Portillo move to join in defendant Lopez's  
motion (Dkt. Nos. 3185, 3175, 3236, 3195). These joinder motions are **GRANTED**.

(Dkt. Nos. 2921, 3142). These motions are **DENIED IN PART**.<sup>2</sup> Pre-majority evidence of a conspiracy is admissible to prove the scope of the conspiracy where a juvenile continues conspiratorial conduct past the age of majority. Although an adult defendant cannot be convicted solely on the basis of acts of juvenile delinquency, post-majority participation in a conspiracy will allow that defendant to be properly charged with the conspiracy. *See United States v. Baker*, 10 F.3d 1374, 1419 (9th Cir. 1993), *overruled on other grounds*. Although our court of appeals has not yet ruled on this exact issue, the Eleventh Circuit has explained that evidence of the entire scope of the conspiracy is admissible to prove the scope of the conspiracy, even if that evidence relates to pre-majority conduct. *United States v. Cruz*, 805 F.2d 1464, 1476 (11th Cir. 1986). Accordingly, so long as the government lays the appropriate foundation at trial, the statements will be admissible with respect to the conspiracy counts.

Acts and statements of coconspirators that occurred prior to the defendants' age of majority, however, are not admissible to prove up the substantive counts. Defendant Flores specifically challenges evidence supporting Count 4 — the substantive firearms charge against him. There is a risk of juror confusion regarding the proper use of evidence with respect to substantive charges versus the conspiracy charges. The Court will thus postpone ruling with respect to Count 4 until it can see what issues are in play with respect to Count 4 and the conspiracy counts. After trial is underway and the Court is able to discern how the issues are shaping up, it will make a judgment call on whether the contested evidence is merely cumulative and probative. Until the Court makes a final ruling, neither side can reference the statements or evidence regarding defendant Flores': (1) involvement in a June 2004 shooting; (2) statement in September 2006 that he shot someone; (3) admission to shooting someone in the Richmond in early 2005; (4) shooting at two Nortenos in late 2004 or early 2005; and (5) admission to killing someone near 24th and Harrison in 2005. This is not

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<sup>2</sup> Defendants Cruz-Zavala, Franco, Guevara, Hernandez, Guillermo Herrera, Lopez, Portillo, and Velasquez move to join in defendant Cruz-Ramirez's motion (Dkt. Nos. 2970, 2939, 3090, 3092, 3095, 3117, 3168, 3187). Defendants Hernandez and Walter Cruz-Zavala move to join in defendant Flores' motion (Dkt. Nos. 3236, 3242). These joinder motions are **GRANTED**.

1 a question of whether the statements are admissible as coconspirator statements under Rule  
2 801(d)(2)(E), but whether the statements run afoul of Rule 403.

3 As a seeming back-up to the exclusion motions, defendant Cruz-Ramirez moves for  
4 the government to be required to make an offer of proof regarding the timing of his entry into  
5 the conspiracy and for a jury instruction regarding the permissible use of evidence pre-dating  
6 his entry into the conspiracy (Dkt. No. 2922). This motion is **DENIED IN PART AND**  
7 **GRANTED IN PART.**<sup>3</sup> The jury will be instructed regarding the proper use of any acts or  
8 statements of coconspirators prior to defendant Cruz-Ramirez's reaching the age of majority  
9 and/or entry into the conspiracy. The exact contours of this instruction will be determined  
10 during trial. The government, however, will not be required to make an advance showing as  
11 to the exact timing of defendant Cruz-Ramirez's entry into the conspiracy. This is a  
12 foundational matter that the government may demonstrate at trial. The defendants have  
13 already been notified of the dates that they purportedly entered the conspiracy and there is no  
14 need for the government to prove it up at this point (Dkt. No. 1655).

15 **16. POST-ARREST COCONSPIRATOR STATEMENTS/ACTS (DKT. NOS. 2919, 3137)**

16 Defendant Cruz-Ramirez moves to exclude evidence of acts by coconspirators that  
17 occurred after he was arrested (Dkt. No. 2919). This motion is **DENIED** without prejudice to  
18 particularized Rule 403 motions being brought as the trial progresses. Where a conspirator  
19 has not withdrawn or abandoned the conspiracy, the arrest or incarceration of a conspirator  
20 does not automatically mean that a conspirator is no longer part of the conspiracy. *See United*  
21 *States v. Jiminez-Recio*, 537 U.S. 270, 275 (2003). Even if the government "defeats" or  
22 frustrates the conspiracy's objective, the conspiracy may be considered to be alive and well.  
23 *See United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992). The actions and  
24 statements of an unarrested coconspirator who is still operating in furtherance of the  
25 conspiracy is still admissible against an arrested coconspirator to prove existence of the  
26 conspiracy. *United States v. Wentz*, 456 F.2d 634, 637 (9th Cir. 1972).

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27  
28 <sup>3</sup> Defendants Cruz-Zavala, Franco, Guevara, Hernandez, Guillermo Herrera, Lopez, Portillo, and Velasquez move to join in the motion (Dkt. Nos. 2939, 2970, 3092, 3095, 3117, 3145, 3168, 3187). These joinder motions are **GRANTED**.

1 Although the evidence is admissible to show the existence of the conspiracy, it may be  
2 that the probative value of the evidence will eventually be outweighed by the prejudicial  
3 impact. At a later point in the trial, defendants may bring new, particularized motions to  
4 exclude further evidence of this type as cumulative and prejudicial under Rule 403.

5 Defendant Lopez makes a variation of this argument and claims that his *deportation*  
6 (rather than arrest) in 2006 amounted to a withdrawal from the conspiracy because his  
7 deportation made it “impossible” for him to withdraw (Dkt. No. 3137). This motion is  
8 **DENIED**. As stated at the pretrial conference, defendant Lopez has provided no authority for  
9 the proposition that deportation is tantamount to withdrawal and defendant Lopez failed to  
10 make a showing that deportation prevented him from taking steps to withdraw — such as  
11 writing a letter or making a telephone call.<sup>4</sup>

12 Defendants Cruz-Zavala, Flores, Hernandez, Guevara, Guillermo Herrera, Portillo,  
13 and Velasquez move to join in defendant Cruz-Ramirez’s motion (Dkt. Nos. 2939, 2970,  
14 3092, 3095, 3117, 3145, 3187). Defendants Cruz-Zavala, Guevara, Hernandez, and Portillo  
15 move to join in defendant Lopez’s motion (Dkt. Nos. 3185, 3175, 3195, 3236). These joinder  
16 motions are **GRANTED**.

17 **17. ADEQUACY OF COCONSPIRATOR STATEMENT SUMMARIES (DKT. NO. 3121)**

18 Defendant Guillermo Herrera moves for referral to a magistrate judge to determine  
19 which coconspirator summaries provided by the government pursuant to the scheduling order  
20 are inadequate (Dkt. No. 3121). As stated at the pretrial conference, given the rapidly  
21 approaching trial date, the motion is **DENIED IN PART AND GRANTED IN PART**. The  
22 summaries will not be referred to a magistrate for review. That would plainly derail the trial  
23 and take weeks. Instead, the undersigned will review the summaries and determine which  
24 summaries, if any, are inadequate. If a summary is deemed inadequate, the government will  
25 be required to supplement the summary or the summarized statement may be precluded from  
26 use at trial.

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27  
28 <sup>4</sup> As stated at the pretrial conference, if defendant Lopez locates any case law that holds that  
deportation is tantamount to withdrawal from a conspiracy, he may re-bring the motion with the additional legal  
authority provided.



As stated at the pretrial conference, the specific challenges raised to item 90 (page 46) and item 155 (page 53) of the government's coconspirator statement summaries are **DENIED** (Feb. 14 Tr. 63, 70).

Defendants Cruz-Ramirez, Cruz-Zavala, Flores, Guevara, Hernandez, Lopez, and Portillo move to join in the motion (Dkt. Nos. 3147, 3148, 3159, 3183, 3185, 3198, 3236, 3277). All joinder motions are **GRANTED** except the joinder motion of defendant Portillo. Defendant Portillo's joinder motion is **DENIED** without prejudice to bringing a new motion specific to his trial. Defendant Portillo has been severed for a separate trial and the circumstances relevant to his trial may differ.

**18. COCONSPIRATOR STATEMENTS BASED ON INSUFFICIENT PROOF OF PARTICIPATION OR MEMBERSHIP (DKT. NOS. 2917, 3143)**

Defendant Flores moves to exclude coconspirator statements on the ground that the government's *summaries* do not establish that the declarant was a member of the conspiracy when the statement was made.<sup>5</sup> Specifically, defendant Flores challenges 67 summaries as insufficient. The motion is **GRANTED IN PART AND DENIED IN PART**.

No statements will be excluded at this juncture on the basis that the government has not yet established the foundational requirements for showing that the statement is indeed a coconspirator statement. As defense counsel acknowledged, the government may establish these foundational requirements at trial (Feb. 14 Tr. 89–90, 94). Accordingly, the coconspirator statements will be conditionally admitted subject to connection under Rule 104(b). At trial, the government must demonstrate that: (1) a conspiracy existed which involved the declarant and the non-offering party; (2) the statement at issue was made during the course of the conspiracy; and (3) the statement was made in furtherance of the conspiracy. Helpfully, the government's summaries specify which statements will be introduced by which witness. Accordingly, where the defense anticipates a specific statement will be introduced by a witness and the government will not be able to make the foundational showing required,

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<sup>5</sup> At the pretrial conference, counsel for defendant Flores admitted that his own investigation provided him with some information as to who certain declarants were, even if the summaries did not specify as much (Feb. 14 Tr. 77–78).

1 the defense should make a specific motion as to that statement prior to the witness' testimony.  
2 Alternatively, if the witness testifies to the statement but it is later shown that the foundational  
3 requirements were not met, on defense motion, the undersigned will give a curative  
4 instruction to the jury, allow the prosecution to reopen the case to establish foundation, or in  
5 extreme cases, declare a mistrial.

6 In order to ensure the orderly progression of trial, however, the 67 challenged  
7 summaries will be reviewed to determine whether they are inadequate under the scheduling  
8 order (Feb. 14 Tr. 94–95). If any summaries are deemed inadequate, the statement may be  
9 excluded or the government will be ordered to supplement the summary.

10 Similarly, defendant Cruz-Ramirez moves to exclude coconspirator statements on the  
11 basis that the government has not yet provided sufficient proof of his participation in the  
12 conspiracy for the *majority* of the time charged in the indictment (Dkt. No. 2917). This  
13 motion is **DENIED**. The motion fails to challenge specific statements as being made at a time  
14 when they could not be considered coconspirator statements admissible to prove the existence  
15 of the conspiracy. A general assertion that the government has insufficient proof to show that  
16 defendant Cruz-Ramirez was a participant in the conspiracy for the *majority* of the time does  
17 not render the statements inadmissible as coconspirator statements. Defendant Cruz-Ramirez  
18 has not provided evidence that he did not ratify the statements after he reached the age of  
19 majority, nor has he provided evidence of withdrawal from the conspiracy — which, as  
20 previously stated, are critical factors to determining whether the statements are admissible to  
21 prove the existence and scope of the conspiracy.

22 Regardless, as explained above in the context of defendant Flores' motion,  
23 coconspirator statements may be conditionally admitted subject to connection under Rule  
24 104(b). Defendant Cruz-Ramirez may bring motions challenging specific statements at trial  
25 prior to witness testimony, or may bring a motion at the close of the government's case if the  
26 foundational requirements are not met.

27 Defendants Cruz-Zavala, Hernandez, Guevara, Guillermo Herrera, Portillo, and  
28 Velasquez move to join in defendant Cruz-Ramirez's motion (Dkt. Nos. 2939, 2970, 3090,

1 3092, 3095, 3117). Defendants Cruz-Zavala, Hernandez, Franco, Guevara, Guillermo  
2 Herrera, and Portillo move to join in defendant Flores' motion (Dkt. Nos. 3185, 3236, 3146,  
3 3187, 3240). All joinder motions are **GRANTED** except the joinder motions of defendants  
4 Velasquez, Franco, and Portillo. Their joinder motions are **DENIED** without prejudice to  
5 bringing new motions specific to their trial. Defendants Velasquez, Franco, and Portillo have  
6 been severed and the circumstances relevant to their trial may differ.

7 **19. DISCLOSURE OF PREVIOUSLY UNDISCLOSED OPERATIVES, COOPERATORS,**  
8 **INFORMANTS AND EXCULPATORY AND IMPEACHING EVIDENCE (DKT.**  
9 **NO. 2995)**

10 Defendant Cruz-Ramirez moves for disclosure of all previously undisclosed  
11 operatives, cooperators, informants, and exculpatory and impeaching evidence regarding  
12 those operatives, cooperators, and informants (Dkt. No. 2995). At the pretrial conference, the  
13 government agreed to produce additional disclosures which may render the motion moot.  
14 Accordingly, as stated at the pretrial conference, the motion is tabled until the defense  
15 receives and reviews these additional disclosures (Feb. 14 Tr. 48). It is up to defense counsel,  
16 however, to renew the motion if it believes the additional disclosures are inadequate to  
17 rendering the motion moot. Otherwise, the motion will be deemed withdrawn.

18 Defendants Cruz-Zavala, Flores, Franco, Guevara, Hernandez, Portillo, and Velasquez  
19 move to join in the motion (Dkt. Nos. 2998, 3090, 3092, 3095, 3117, 3145, 3187). All joinder  
20 motions are **GRANTED** except the joinder motions of defendants Velasquez, Franco, and  
21 Portillo. Their joinder motions are **DENIED** without prejudice to bringing new motions  
22 specific to their trial. Defendants Velasquez, Franco, and Portillo have been severed and the  
23 circumstances relevant to their trial may differ.

24 **20. EXCLUSION OF "OTHER ACTS" EVIDENCE (DKT. NO. 3153)**

25 Defendant Guillermo Herrera moves to exclude acts that do not appear on the face of  
26 the indictment, arguing that the government has failed to provide sufficient Rule 404(b)  
27 notice. As stated at the pretrial conference, the motion is **DENIED** without prejudice to  
28 challenges to specific items (Feb. 14 Tr. 209–10). As is, the motion is too vague and the  
undersigned will not place the burden on the government to prove at this juncture that every

1 act it intends to use is direct proof of the charged offenses or is inextricably intertwined with  
2 the proof. Instead, it is up to the defendants to raise — via oral motion or written motion —  
3 specific acts that may be “other acts” under Rule 404(b).

4 Defendants Cruz-Zavala, Flores, Guevara, Hernandez, Lopez, and Portillo move to  
5 join in the motion (Dkt. Nos. 3175, 3177, 3185, 3195, 3216, 3236). All joinder motions are  
6 **GRANTED** except the joinder motion of defendant Portillo. Defendant Portillo’s joinder  
7 motion is **DENIED** without prejudice to bringing a new motion specific to his trial. Defendant  
8 Portillo has been severed and the circumstances relevant to his trial may differ.

9 **21. RECORDINGS MADE BY “UNSUPERVISED” INFORMANTS (DKT. NOS. 3150,**  
10 **3179)**

11 Defendants Franco and Guillermo Herrera move to exclude recordings made at the  
12 “discretion” of “unsupervised” informants (Dkt. Nos. 3150, 3179). As stated at the pretrial  
13 conference, the motions are **DENIED** without prejudice to the bringing of directed challenges  
14 to specific recordings. The mere fact that the informants had discretion to turn on and off the  
15 devices is not a basis to exclude for the obvious reason that informants are oftentimes placed  
16 in dangerous situations and must have the discretion for their own safety, among other  
17 reasons.

18 At the time recordings are offered at trial, counsel may cross-examine the sponsor of  
19 the recordings to develop a foundation from which it can be concluded that the manner of  
20 recording is so selective as to be unworthy of admission. This will be done in the presence of  
21 the jury since it will not be so inflammatory that an order to disregard the recording would be  
22 futile.

23 Defendants Cruz-Zavala, Flores, Guevara, Hernandez, Guillermo Herrera, and Portillo  
24 move to join in defendant Franco’s motion (Dkt. Nos. 3152, 3175, 3179, 3180, 3185, 3195,  
25 3236). These joinder motions are **GRANTED**. Defendants Hernandez, Lopez, Portillo, and  
26 Velasquez move to join in defendant Guillermo Herrera’s motion (Dkt. Nos. 3217, 3236,  
27 3256, 3357). These joinder motions are also **GRANTED**.

28 **22. CORPUS DELICTI DOCTRINE (DKT. NO. 3140)**

Defendant Flores moves to exclude all evidence of crimes he allegedly committed

1 until after the government first produces independent evidence that the crimes actually  
2 occurred (Dkt. No. 3140). The motion is **DENIED**.

3 When the government seeks to rely on a defendant's confession or admission to meet  
4 its burden of proof, the *corpus delicti* doctrine provides that the government is required to  
5 provide corroborative evidence that the criminal conduct actually occurred and that the  
6 confession/admission was trustworthy. See *United States v. Lopez-Alvarez*, 970 F.2d 583, 592  
7 (9th Cir. 1992). Defendant Flores, however, has provided no authority that dictates that the  
8 corroborative evidence must be provided before the confession or admission is admitted.  
9 Instead, as defendant Flores' reply brief acknowledges, the confessions/admissions may be  
10 admitted but if the government fails to provide adequate corroborative evidence, the evidence  
11 is to be stricken and a proper jury instruction given (Reply 4).

12 Notably, the purpose of the *corpus delicti* doctrine is to guard against uncorroborated  
13 confessions or admissions serving as the sole basis for conviction of a criminal charge or  
14 proof of an essential element of the crime. As explained in *Opper v. United States*, 348 U.S.  
15 84, 91 (1954), although the *corpus delicti* doctrine applies to admissions, it applies to those  
16 "statements of the accused out of court that show essential elements of the crime . . .  
17 necessary to supplement an *otherwise inadequate basis for a verdict of conviction*" (emphasis  
18 added). It is unlikely that the government's sole evidence of any of the essential elements of  
19 the crimes charged will be a defendant's own confession or admission. Requiring the  
20 government to provide corroborative evidence before allowing it to introduce any confessions  
21 or admissions would pose an onerous and unnecessary burden given that most elements — if  
22 not all elements — of the crimes charged will *not* be solely based on a defendant's confession  
23 or admission. A better course of action is for defendants to bring *corpus delicti* motions when  
24 those motions are ripe after the presentation of evidence.

25 Defendants Cruz-Zavala, Guevara, Hernandez, Guillermo Herrera, Lopez, and Portillo  
26 move to join in the motion (Dkt. Nos. 3242, 3226, 3236, 3435, 3215, 3239). All joinder  
27 motions are **GRANTED** except the joinder motion of defendant Portillo. Defendant Portillo's  
28 joinder motion is **DENIED** without prejudice to bringing a new motion specific to his trial.

1 Defendant Portillo has been severed for a separate trial and the circumstances relevant to his  
2 trial may differ.

3 **23. PERMISSION TO FILE ADDITIONAL OBJECTIONS (DKT. NO. 3329)**

4 Defendant Cruz-Ramirez moves for permission to file additional objections and  
5 motions to exclude government evidence as additional disclosures are made by the  
6 government (Dkt. No. 3329). As stated at the pretrial conference, this motion is **GRANTED IN**  
7 **PART AND DENIED IN PART** (Feb. 14 Tr. 211–12). As additional disclosures are made, new  
8 evidence discovered, and as trial progresses, the parties will of course be able to bring  
9 additional motions and objections. There may be circumstances, however, where a motion or  
10 objection clearly should have been noticed for the pretrial conference or an even earlier date.  
11 As such, the moving party should be prepared to explain why any such motion should not be  
12 denied as untimely.

13 Defendants Cruz-Zavala, Flores, Guevara, Hernandez, Lopez, and Portillo move to  
14 join in the motion (Dkt. Nos. 3339, 3340, 3344, 3345, 3348, 3384). These joinder motions are  
15 **GRANTED**.

16 **GOVERNMENT MOTIONS *IN LIMINE* (DKT. NO. 3020)**

17 The government moves for a number of *in limine* rulings, mostly regarding general  
18 conduct at trial. Defendants Flores and Guillermo Herrera filed oppositions in response to the  
19 motions *in limine* (Dkt. Nos. 3266, 3293). Defendants Lopez, Portillo, Guevara, Hernandez,  
20 Cruz-Zavala, Cruz-Ramirez, and Guillermo Herrera move to join in defendant Flores’  
21 opposition (Dkt. Nos. 3300, 3303, 3323, 3325, 3334, 3338, 3340). Defendants Hernandez,  
22 Lopez, Portillo, Guevara, Cruz-Zavala, Velasquez, and Cruz-Ramirez move to join in  
23 defendant Guillermo Herrera’s opposition (Dkt. Nos. 3300, 3303, 3323, 3325, 3334, 3340,  
24 3357). All joinder motions are **GRANTED** except those filed by defendants Velasquez and  
25 Portillo. Defendants Velasquez and Portillo have been severed for a separate trial and the  
26 government may choose to bring different motions *in limine* and the issues may differ.

27 The rulings on the government’s motions *in limine* are as follows.  
28

1           **1.       EXTRINSIC EVIDENCE FOR IMPEACHMENT**

2           The government seeks to generally preclude the use of extrinsic evidence for  
3 impeachment. As stated at the pretrial conference, the motion is **DENIED** without prejudice to  
4 specific challenges being brought at the proper time (Feb. 16 Tr. 23).

5           **2.       CONSIDERATION OF EVIDENCE ALREADY IN THE RECORD**

6           The government reminds the Court that under Rule 104(a) the Court “can and should”  
7 consider evidence already presented in the proceedings to date in determining the  
8 admissibility of evidence at trial, specifically when determining the admissibility of  
9 coconspirator statements.

10          The defense does not oppose this understanding of Rule 104(a) but argues that the  
11 government has not yet provided a sufficient foundation to support the admission of  
12 coconspirator statements. As discussed in the context of the defense pretrial motions,  
13 coconspirator statements will only be conditionally admitted, subject to the required  
14 foundational elements being proven up at trial. The defense’s concern that the government  
15 has not yet proven all foundational elements as to all coconspirator statements is premature.

16          Defendant Flores has expressed concern that *ex parte* material has been relied upon in  
17 determining the admissibility of coconspirator statements. To clarify, the undersigned has not  
18 and will not rely on *ex parte* submissions in determining whether the foundational  
19 requirements have been met for admission of coconspirator statements.

20           **3.       ADMISSION OF COOPERATION AGREEMENTS**

21          The government seeks a ruling finding cooperation agreements relevant and  
22 admissible when the defense has attacked the credibility of cooperators on the basis of their  
23 agreements with the government. Specifically, the dispute centers around whether the  
24 government may introduce cooperation agreements during direct examination if the defense  
25 attacks the credibility of a witness during opening statements. Additionally, the parties  
26 dispute the specific admissibility of the truthfulness provision of the agreements.

27          The government’s motion is **GRANTED IN PART**. The cooperation agreements —  
28 including the truthfulness provisions — will be admissible on direct examination *if* during

opening statements the defense specifically attacks the witness' credibility because of his/her cooperation. Our court of appeals has explained the "vouching" concern arises where the prosecution refers to an agreement's requirement of truthfulness *before* the issue of bias is drawn. As explained in *United States v. Wallace*, 848 F.2d 1464, 1474 (9th Cir. 1988), "[r]eferences to truthfulness requirements in plea agreements do not constitute vouching when made in response to attacks on the witness's credibility because of the plea agreement" (citation omitted). The authorities relied on by the defense involve circumstances where the prosecution raised the issue of plea agreement terms *prior* to the defense. For example, in *United States v. Shaw*, 829 F.2d 714, 716–17 (9th Cir. 1987), the prosecutor called the jury's attention to the plea agreement and its requirement of truthful testimony during its *opening statement*. This would clearly be impermissible, but the government has offered its assurances that it will not call attention to the plea agreement on direct examination unless the defense first attacks credibility on that basis in opening statements.

Before the government may introduce evidence of the cooperation agreement for a particular witness, however, the government must first notify the defense so that there is sufficient opportunity for objections to be made in the event that there is a dispute as to whether the witness' credibility was attacked due to cooperation.

#### 4. REQUIREMENT TO PROFFER BASIS OF ANY *HENTHORN* QUESTIONS

The government moves to require defendants to proffer the basis for any *Henthorn* based questions prior to questioning a witness with such questions. This motion is **GRANTED IN PART**. As stated at the pretrial conference, the procedure will be that all *Henthorn* issues must be vetted with the Court in advance of questioning except where the question is regarding an express, sustained finding of untruthfulness, a false statement, or a false report (Feb. 16 Tr. 33). In those instances, no prior permission will be needed. In all events, the government shall not tip the hand of the defense to the officer that will be questioned.

#### 5. EVIDENTIARY BASIS FOR DURESS, SELF-DEFENSE CLAIMS, AND THIRD PARTY GUILT DEFENSES

The government seeks an order requiring defendants to provide an evidentiary basis for any affirmative defense of duress, self-defense, or third-party culpability before any



1 defendant is permitted to assert the defense at trial. As stated at the pretrial conference, this  
2 request is **DENIED** without prejudice to the government re-bringing the motion if it becomes  
3 apparent that any particular defendant is wasted time by arguing an affirmative defense that is  
4 nothing more than a “side-show” (Feb. 16 Tr. 60).

5 **6. REFRESHING RECOLLECTION**

6 The government seeks an order requiring the parties to properly refresh recollection.  
7 Of course, both sides must use the proper procedure to refresh recollection at trial. As  
8 discussed at the pretrial conference, the parties shall not read out loud from a document in  
9 evidence and ask the witness whether their his/her recollection is then refreshed. The witness  
10 must first state that he or she cannot remember something. Then, the item may be given to the  
11 witness to read silently.

12 **7. IMPROPER SPEAKING OBJECTIONS**

13 The government requests that the defense be precluded from making speaking  
14 objections with no proper purpose. In response, the defense requests civility during defense  
15 examinations. As stated at the pretrial conference, the undersigned is confident that defense  
16 counsel and government counsel will conduct themselves professionally and appropriately at  
17 trial and will not improperly disrupt examinations (Feb. 16 Tr. 79–81).

18 **8. ARGUING NEGATIVE INFERENCES DUE TO ABSENCE OF A PARTICULAR TYPE**  
19 **OF EVIDENCE OR FORENSIC EVIDENCE**

20 The government seeks to preclude the defense from arguing that the jury cannot  
21 convict without a particular type of evidence. As is, the motion is too vague. There is no  
22 universal bar against defense comments regarding the government’s failure to present  
23 witnesses or evidence, although in some instances certain arguments may be improper. The  
24 motion is **DENIED** without prejudice to re-raising with respect to specific instances.

25 **IT IS SO ORDERED.**

26  
27 Dated: March 3, 2011.

28   
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE